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[USAID ADMINISTRATOR LETTERHEAD]

ACTION MEMORANDUM

S/ES

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AUG 15 2002

UNCLASSIFIED

TO: The Secretary

FROM: The Administrator /s/ *Andrew S. Natsios*

SUBJECT: Blanket C-175 Request for USAID to Negotiate and
Conclude Certain International Agreements

ISSUE FOR DECISION

- Whether to approve a blanket Circular 175 (C-175) authorization for USAID to negotiate and conclude "framework" and "implementing" international agreements.

USAID currently concludes most of its bilateral international agreements (pursuant to which that agency establishes its missions and provides foreign assistance) under blanket C-175 authorization from the Secretary, dated July 27, 1956, to USAID's predecessor agency, the International Cooperation Agency. The format, scope, and content of these agreements have changed substantially in recent years (USAID's current practice is summarized at Tab 1).

Accordingly, I am asking that you update USAID's blanket C-175 authorization specifically to cover:

- Framework Agreements, which establish the terms and conditions for USAID Missions, along the lines of the draft text agreement (Tab 3). The text of any such proposed agreements

will continue to be subject to the concurrence of L, relevant regional offices and other agencies or bureaus as appropriate; and

- Implementing Agreements, pursuant to which assistance valued at more than \$25 million is provided and that are of a routine nature(Agreements for lesser amounts are not treated as international agreements for C-175 purposes). The most common of these are the Model Strategic Objective Grant Agreement and Model Limited Scope Grant Agreement (Tabs 4 and 5, respectively). Non-routine implementing agreements involving unique political, legal or funding issues will require separate C-175 authorization.

Other standard elements for C-175 authorization are discussed at Tab 1. Tab 2 includes a Memorandum of Law indicating that there are no legal objections to the negotiation and conclusion of USAID framework and implementing agreements.

RECOMMENDATION

1. That you approve a blanket C-175 authorization for USAID to negotiate and conclude bilateral "framework" agreements, subject to the concurrence of L, the relevant regional offices and any other agencies or bureaus.

Approve X CLP Disapprove _____

2. That you approve a blanket C-175 authorization for USAID to negotiate and conclude routine "implementing" agreements for assistance over \$25 million in value, with the understanding that USAID will still have to seek separate C-175 authority where a particular agreement, regardless of the value of the assistance at stake, involves unique political, legal or funding issues.

Approve X CLP Disapprove _____

Attachments:

- Tab 1 -- Background and Standard C-175 Elements
- Tab 2 -- Memorandum of Law
- Tab 3 -- Draft Text of Agreement for Economic and Technical Cooperation
- Tab 4 -- Model Strategic Objective Grant Agreement
- Tab 5 -- Model Limited Scope Grant Agreement

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Background and Standard C-175 Elements

I. USAID's International Agreements

Currently, USAID enters into a number of "framework" bilateral agreements with other states that -

- establish the USAID Mission as a special mission in the territory of the other party;
- identify the privileges and immunities to be provided to USAID personnel by the other party;
- detail the privileges and exemptions from taxes and duties for USAID-financed supplies and services and USAID contractors and recipients in the territory of the other party; and
- list other general terms and conditions for USAID programs in the territory of the other party.

Negotiation and conclusion of these agreements are authorized (under the 1956 C-175 authorization and hereafter under this C-175 authorization) by the USAID Administrator or his or her designee and are cleared with the Department's Office of the Legal Adviser and other appropriate offices. A sample of a USAID framework agreement is attached at Tab 3 to the accompanying Action Memorandum.

USAID also enters into "implementing" agreements with foreign governments under which specific activities and programs financed with USAID administered foreign assistance funding are implemented. The most common of these are the Strategic Objective Grant Agreement and the Limited Scope Grant Agreement (model texts of each are attached at Tabs 4 and 5 to the accompanying Action Memorandum). Other examples are agreements for programs funding commodity imports (referred to as commodity import grant agreements), cash transfer grant agreements making cash grants for stipulated purposes for which the recipient country can use the cash grant, memoranda of understanding, and guarantees and other credit program agreements. These agreements are of a general type with standard formats and are negotiated and signed by USAID Mission Directors or their designees, including Ambassadors and officials of other agencies on occasion, with USAID legal clearance and other State and USAID clearances, as appropriate.

Both types of agreements - framework and implementing -- reflect USAID programs developed and implemented in consultation with State bureaus and offices and Ambassadors through the budget process, the USAID Strategic Plan, Mission Performance Plans, and a variety of other inter-agency mechanisms.

II. Standard C-175 Authorization Elements (11 FAM 722.3)

Congressional Consultation

Although no congressional consultations are considered necessary with respect to specific framework or implementing agreements, Congress is notified of USAID programs through the Congressional Presentation process and is consulted through hearings, briefings and meetings that deal with every aspect of USAID operations. USAID also makes efforts to ensure the public participates in the development and design of USAID's Strategic Plan and other planning documents.

Assignment of Personnel

Any overseas assignment of personnel under these agreements will be done through the procedures established by National Security Decision Directive (NSDD) 38.

Funding Issues

The Department of State commits no funds or personnel to the implementation of either framework or implementing agreements. Any obligation of funds by USAID under either a framework or implementing agreement is met from existing available funding resources, including appropriated funds, where appropriate.

Environmental Issues

USAID has environmental procedures that assess the environmental impact of its programs in a uniform and comprehensive manner and implement the National Environmental Policy Act, 42 U.S.C. §4321 et seq., and Executive Order 12144 (January 4, 1979). USAID agreements do not generally require the preparation of environmental impact statements or other documentation under NEPA or Executive Order 12144.

Memorandum of Law

SUBJECT: Circular 175: U.S. Agency for International Development ("USAID") Request for Blanket Authorization to Negotiate and Conclude Certain International Agreements

In accordance with the Circular 175 procedure, 11 FAM 700 et seq., the accompanying action memorandum requests blanket authority for USAID to negotiate and conclude certain classes of international agreements for its foreign assistance and food aid programs, discussed in more detail at Tab 3 to the accompanying Action Memorandum.

USAID is currently operating under a blanket authorization from the Secretary issued on July 27, 1956, to USAID's predecessor agency, the International Cooperation Agency. The present C-175 request is designed to address the extensive changes to the format, scope and content of USAID agreements and to be more consistent with current USAID operations, for example with respect to privileges and immunities as well as fiscal privileges granted the USAID mission and its personnel.

The agreements subject to the accompanying Circular 175 authority fall into two broad categories: (a) framework agreements that establish the USAID Mission as a special mission in another country, where the other party commits to provide the mission with specific privileges and immunities for USAID, USAID personnel, contractors and recipients, as well as USAID-financed supplies and services; and (b) implementing agreements that govern the provision of foreign assistance, in the form of a particular grant or a program to the other party.

The framework agreement generally involves unilateral non-reciprocal commitments by the other government to the United States. It contains no ongoing USG commitments to provide foreign assistance, in any form (e.g., either by grants or program activities); but rather apply to such assistance as may be given subject to U.S. law. The implementing agreements may apply to grants of amounts stated therein. They are carefully and appropriately caveated that the provision of any assistance generally be subject to U.S. law, including that the provision in specified amounts be subject to the availability of funds to

USAID for this purpose. Such assistance funds are appropriated in annual Foreign Operations, Export Financing and Related Programs Appropriations Acts.

Accordingly, the authority to negotiate and conclude such agreements is derived from the President's Constitutional Powers (Article II), including his authority to represent the nation in foreign affairs, as delegated to the Secretary of State on a day-to-day basis (22 U.S.C. 2656). Furthermore,

additional authority exists under the Foreign Assistance Act and the Agricultural Trade Development and Assistance Act of 1954—the statutes pursuant to which USAID conducts its foreign assistance and food aid programs, respectively—for the President to enter into agreements concerning the provision of foreign assistance. Specifically, section 635(b)

of the Foreign Assistance Act of 1961, as amended, ("FAA"), 22 U.S.C § 2151 et seq. provides legal authority for the negotiation and conclusion of executive agreements. Section 635(b) provides:

The President may make loans, advances, and grants to, make and perform agreements and contracts with, or enter into other transactions with, any individual, corporation, or other body of persons, friendly government or government agency, whether within or without the United States, and international organizations in furtherance of the purposes and within the limitations of this Act.

This authority was delegated to the Secretary of State in Executive Order 12163, as amended (March 31, 1999). The Secretary specifically delegated to the Administrator of USAID in Delegation of Authority No. 145 the authority to negotiate, sign and terminate international agreements for USAID programs, subject to the Circular 175 procedure.

Similarly, Titles II and III of the Agricultural Trade Development and Assistance Act of 1954, as amended, ("P.L. 480,"), 7 U.S.C. § 1691 et seq. authorize the President in Sections 201 and 202 of Title II, to "establish a program to provide agricultural commodities to foreign countries"; to provide emergency assistance "through governments and public or private agencies, including intergovernmental organizations"; and to provide non-emergency assistance through intergovernmental organizations. 7 U.S.C. §§ 1721 and 1722.

To this end, section 301(b) of Title III, 7 U.S.C. § 1727(b) provides that the Administrator of USAID "may negotiate and execute agreements with less developed countries to provide commodities to such countries on a grant basis."

The authority to implement Titles II and III of P.L. 480 is delegated to the Administrator of USAID by the President in Executive Order 12752 (February 25, 1991).

Only implementing agreements involving specific grants of assistance greater than \$25 million are considered subject to the accompanying Circular 175 request. The Department has taken the position that grant agreements involving less than \$25 million are not considered international agreements and has stated the following in its regulations concerning Circular 175 procedures:

Finally, it should be noted that United States agencies frequently enter into contracts and similar arrangements with other governments that the Department of State does not consider constitute international agreements under the criteria established in the Department's regulations, 22 C.F.R. 181.2. These include . . . such arrangements as bilateral agreements extending grants of \$25 million or less by the Agency for International Development to foreign governments and P.L. 480 agreements under which the United States sells food commodities to foreign governments. The Department of State does not publish such arrangements, as it considers them not to be international agreements within the meaning of the Case Act.

60 Fed. Reg. 54320 (Oct. 23, 1995).

At the same time, framework agreements and implementing agreements in excess of \$25 million will generally be considered international agreements, within the meaning established in 22 C.F.R. 181.2. As such, USAID will transmit these agreements to the Department as they are concluded so that they can be reported to Congress consistent with the requirements of the Case Act, 1 U.S.C. 112b. Finally, as noted in the action memorandum, agreements relating to assistance or less than \$25 million may be considered international agreements if they present issues of a non-routine nature (e.g., political), and hence any such non-routine agreements, regardless of the value of the assistance with which they are associated, shall be

considered international agreements requiring a separate Circular 175 authorization. The Office of General Counsel at USAID has advised that there are no legal impediments to concluding such agreements.

On the basis of these considerations, I conclude that there are no legal objections to granting USAID blanket authorization to negotiate and conclude the framework and implementing agreements described in the accompanying action memo and its attachments.

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